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Supreme Court of the United States

OCTOBER TERM, 1951

No. 401

KONRAD G. JOHANSEN,

Petitioner,

against

THE UNITED STATES OF AMERICA.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR PETITIONER

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BRIEF FOR PETITIONER

Preliminary Statement

This is an appeal from an order made on respondent's motion, dismissing a civilian seaman's suit brought under the Public Vessels Act (46 U. S. C. 741-9). The District Court (S. D. N. Y.) had granted respondent's motion to dismiss on one ground. On appeal, the dismissal was affirmed (C. A. 2d), but on a completely different ground, over a dissenting opinion. Certiorari was granted on a showing that there was a conflict among the circuits with reference to the ground relied upon by the Court of Appeals (2d Circuit).

I

Facts

The facts are not in dispute. Petitioner filed a suit in admiralty in the United States District Court for the Southern District of New York, seeking to recover $25,000 damages for personal injuries sustained while he was employed by the government, as a civilian seaman, comprising part of the crew of the U.S.A.T. Kingsport Victory, a public vessel of the United States.

The libel alleged that on August 5, 1949, the petitioner, while working, was hit in the leg by falling lumber and was injured, because of the negligence of the respondent and the unseaworthiness of the vessel. The respondent's own exhibits show that at the time of this accident, the vessel was safely at its pier in Brooklyn, New York, and was not engaged in any military operation. (The majority opinion of the Court of Appeals contains an erroneous statement in its recitation of facts, when it alleges that "the parties agree that the transport was engaged in a military operation" at the time of the accident. There was no such agreement or stipulation between the parties or their counsel, express or implied, at any time, nor has there ever been any claim or evidence to that effect.)

Petitioner was admitted to a U. S. Marine Hospital that same day, where he received treatment for more than two and a half months, until October 24, 1949, with two further weeks of disability thereafter, following a skin graft operation, and other treatment which he received for his lacerated leg.

It was conceded by the Government, in the court below, that petitioner was expressly informed by his superiors, acting on behalf of the United States, that he had no right to seek damages against the Government under the Public Vessels Act, but was told instead that his sole exclusive right was to receive compensation benefits under the United

States Employees' Compensation Act. Believing this information to be correct, and influenced by it, he duly made application for compensation benefits, and was awarded and paid $358.20, until his disability terminated on November 7, 1949, at which time he resumed his duties. There was never any hearing.

He then brought this suit on February 8, 1950, on learning that he had a right to seek damages under the Public Vessels Act, in lieu of compensation. The District Court dismissed the suit, holding that when he was injured, petitioner had a right to elect whether to sue the Government for damages, and that his mere acceptance of compensation constituted an "election", even though his employer had misled him as to his rights (reported as *Johansen* v. *U. S.*, 1951 A. M. C. 117).

On appeal, the United States Court of Appeals for the Second Circuit affirmed the dismissal, but on a completely different ground. It held that a civilian seaman employed by the Government on a public vessel, although injured because of fault attributable to the United States, has no right of election; that such a person has no right to sue the Government for damages for personal injuries brought about by his employer's negligence or the vessel's unseaworthiness; and that his exclusive remedy would be to seek workmen's compensation benefits (reported as *Johansen* v. *U. S.*, 191 F. 2d 162 (C. A. 2nd, 1951). Circuit Judge Chase wrote the majority opinion. Circuit Judge Frank wrote a dissenting opinion to the effect that such a seaman has a right of election under the reasoning of *Johnson* v. *U. S.*, 186 F. 2d (C. A. 4th, 1950), and since petitioner's superiors had erroneously led him to believe that his sole remedy was under the Compensation Act, petitioner never actually exercised his right of election, and therefore had a right to maintain this suit.

A petition seeking certiorari was filed because the decision herein enunciated a doctrine which was in conflict with the following decisions in other Circuits:

Johnson v. *U. S.*, 186 F. (2d) 120 (C. A. 4th, 1950); *U. S.* v. *Marine*, 155 F. (2d) 456 (C. A. 4th, 1946); *U. S.* v. *Loyola*, 161 F. (2d) 126 (C. A. 9th, 1947).

II

The Question Presented

The majority opinion of the Court of Appeals succinctly stated the question presented, as follows:

> "This appeal requires us to decide whether a civil employee of the United States who is employed as a member of a crew of an army transport may sue the government, under the Public Vessels Act, 46 U. S. C. §§ 741-749, to recover for personal injuries received in line of duty, or must accept as sole compensation an award under the Federal Employees' Compensation Act, 5 U. S. C. §§ 751 et seq."

Since the majority opinion came to the conclusion that petitioner's exclusive remedy lay under the Compensation Act, it did not decide whether payment to him of compensation benefits, when his employer had misinformed him concerning his rights, precluded him from bringing the suit for damages. The dissenting opinion decided these questions in favor of petitioner.

III

Petitioner Was Entitled to Sue Under the Public Vessels Act

The basic question here is whether the petitioner was entitled to sue the Government for damages under a tort liability act (The Public Vessels Act), or whether he was relegated to an exclusive remedy under the Federal Employees' Compensation Act. It thus becomes necessary

to consider how the courts have interpreted both of these acts.

In 1926, the Public Vessels Act was adopted (46 U. S. C. section 741-749), giving a right to sue the Government for damages resulting from the fault of a public vessel of the United States. At first this was interpreted as referring to "damage physically done by a ship" (*O'Neal* v. *U. S.*, 11 F. (2d) 869, aff'd 11 F. (2d) 871, 1925). That interpretation, however, was held to be too narrow a construction. In *Canadian Aviator, Ltd.* v. *U. S.*, 324 U. S. 215, 65 Sup. Ct. 639 (1945), it was finally held that the Public Vessels Act makes the Government liable to respond in damages for the negligence of its personnel, or the unseaworthiness of a public vessel; that the Act is not limited to damage physically done by a ship and that the Act gives a right of recovery against the Government for personal injuries sustained by civilian personnel while working on a public vessel.

American Stevedores, Inc. v. *Porello*, 330 U. S. 446, 67 Sup. Ct. 847 (1947);

Mejia v. *United States*, 152 F. (2d) 686 (C. C. A. 5th, 1945) cert. den. 328 U. S. 862, 66 Sup. Ct. 1366 (1946);

United States v. *Loyola*, 161 F. (2d) 126 (C. C. A. 9th, 1947);

Johnson v. *United States*, 186 F. (2d) 120 (C. A. 4th, 1950);

Lauro v. *United States*, 162 F. (2d) 32 (C. C. A. 2d, 1947);

Thomason v. *United States*, 184 F. (2d) 105 (C. A. 9th, 1950);

Jentry v. *United States*, 73 F. Supp. 899 (D. C. Cal., 1947);

Lawson v. *United States*, 1950 A. M. C. 617 (D. C. Cal.).

Meanwhile, however, the Public Vessels Act was further construed as holding that it did not give a right to

recover damages from the Government, for injuries sustained by military personnel in the line of active duty.

Brady v. *United States*, 151 F. (2d) 742 (C. C. A. 2d), cert. den. 326 U. S. 795, 66 Sup. Ct. 484, ref. den. 328 U. S. 880, 66 Sup. Ct. 1348 (1946);
Dobson v. *United States*, 27 F. (2d) 807, cert. den. 278 U. S. 653, 49 Sup. Ct. 179 (1929).

This is similar to the interpretation recently given to the Federal Tort Claims Act, under which shore-side military personnel have similarly been held not entitled to sue the Government for damages for personal injuries sustained in the line of active duty (*Feres* v. *U. S.*, 340 U. S. 135, 71 Sup. Ct. 153 (1950)).

Thus the Public Vessels Act, like the Federal Tort Claims Act, recognized a distinction between suits by civilians, as contrasted with suits by members of the armed forces, injured in line of duty. Congress had decided that civilians were to be given the right to sue the Government for damages based on tort, while military personnel injured in line of duty, were to be denied such a right.

Since petitioner herein was a civilian, and since it appears clear from the foregoing authorities, that there is nothing in the Public Vessels Act to prevent him from recovering damages based on tort, we now turn to a consideration of the Federal Employees' Compensation Act.

IV

The Federal Employees' Compensation Act Did Not Provide an Exclusive Remedy

Prior to the decision of the Court of Appeals herein, the Federal Employees' Compensation Act had been consistently interpreted as not providing an exclusive remedy to a civilian government employee injured during the course of his work. As we shall see, if he was able to show that his

injuries were due to some faulty condition for which the government had waived immunity through some tort liability act, then the employee could elect compensation under 5 U. S. C. A. 757, or else seek damages under any applicable tort act.

Originally 5 U. S. C. A. § 757 (Federal Employees' Compensation Act) read as follows:

> "§ 757. Person receiving not to be paid for other services; pensions. As long as the employee is in receipt of compensation under this chapter, or, if he has been paid a lump sum in commutation of installment payments, until the expiration of the period during which such installment payments would have continued, he shall not receive from the United States any salary, pay, or remuneration whatsoever except in return for services actually performed, and except pensions for service in the Army or Navy of the United States (Sept. 7, 1916, c. 458, § 7, 39 Stat. 743)."

Literally read, this compensation statute, on its face, would seem to indicate nothing more than that a disabled federal employee, who receives workmen's compensation, shall not, at the same time, also receive his salary. However, we shall see the Act did not receive this simple construction. While the Act did not mention "damages", it was soon construed to also mean that in those instances where the employee had a right to sue the Government in tort for damages, such a course could be pursued only in lieu of workmen's compensation.

Thus, in *Dahn* v. *Davis*, etc., 258 U. S. 421, 42 Sup. Ct. 320 (1922), a railway clerk employed by the Government was injured during a train wreck, while the Government was operating the railroad. There was a statute entitling persons to sue the Government for damages in the event of its negligent operation of the railroad. There was also in existence the Federal Employees' Compensation Act. The injured employee filed a suit to recover damages under the Railway Act, and the Government sought a dismissal on the ground that the Compensation Act was his only remedy.

Far from holding that the Compensation Act was the man's sole and exclusive remedy, as respondent claims, Mr. Justice Clarke clearly stated at page 428:

> "This reference to the two acts shows that the petitioner had two remedies, each for the same wrong and both against the U. S. * * *."

The Court in the *Dahn* case then held that the shore-employee involved, had made an election under the facts of that case, to pursue his Compensation remedy, and therefore could not now sue for damages. (The case did not involve a civilian seaman, to whom, as we shall show, different principles apply in determining what constitutes an "election".)

In *U. S.* v. *Marine*, 155 F. 2d 456 (C. C. A. 4th, 1946) a customs inspector, employed by the Government, was injured during his work, while he was on a merchant vessel owned and operated by the United States. Instead of seeking Workmen's Compensation, he filed a suit against the Government under a tort liability act (Suits in Admiralty Act). The United States contended that compensation was his exclusive remedy, but the Court held that his right to elect to sue for damages in tort was "unchallengeable" (p. 458).

In *U. S.* v. *Loyola*, 161 F. 2d 126 (C. C. A. 9th, 1947) a civilian seaman, employed on an army transport became disabled. The Court held that although this was a public vessel, he had a right to seek damages from the Government in tort under the Public Vessels Act.

In *Johnson* v. *U. S.*, 186 F. (2d) 120 (C. A. 4th, 1951), the same result was reached.

In *Panama R. Co.* v. *Strobel*, 282 F. 52 (C. C. A. Canal Zone, 1922), the court stated page 53:

> "Strobel was an employee of the United States, and entitled to avail himself of the provisions of the Compensation Act. We do not think, however, that this was an exclusive remedy * * *."

See also *Payne* v. *Cohlmeyer*, 275 F. 803 (C. C. A. 7th, 1921) and *Midwest Nat. Bank & Trust Co.* v. *Davis*, 288 Mo. 563, 233 S. W. 406 (1921).

In *Brooks* v. *U. S.*, 337 U. S. 49, 69, Sup. Ct. 918 (1949), a soldier riding in a private car while on leave, was injured as the result of a collision with a negligently driven Army truck. There was a tort liability act applicable (Federal Tort Claims Act) and there was also a type of compensation act applicable to military personnel. Recovery of damages was permitted, although the plaintiff was a member of the armed forces, because the injuries did not arise out of an activity incidental to his military service. Not being on active duty, his rights were like those of a civilian. In reversing the Court below, and finding in favor of the injured man, Mr. Justice Murphy stated:

(p. 53)

> "Provisions in other statutes for disability payments to servicemen * * * indicate no purpose to forbid tort actions under the Tort Claims Act * * * we will not call either remedy in the present case exclusive, nor pronounce doctrine of election of remedies when Congress has not done so."

(p. 54)

> "We conclude that the language, framework and legislative history of the Tort Claims Act require holding that petitioner's actions were well founded."

Gibbs v. *U. S.*, 94 F. Supp. 586 (D. C. Cal., 1950), while a lower Court decision, contains an excellent review of the numerous decisions affecting this problem. It comes to the positive and uncategorical conclusion that the Federal Employees' Compensation Act had never been interpreted as affording an exclusive remedy to federal civilian employees when there was also available a parallel remedy to seek damages against the Government under a tort liability act.

Thus, it was recognized at that time that there was "nothing in the Federal Employees' Compensation Act which

directly or indirectly would bar the right" to seek damages against the Government in the absence of an "election", i.e., one could choose to sue for damages or elect to take compensation. *United States* v. *Marine*, 155 F. (2d) 456, 459 (C. C. A. 4th, 1946).

Since it was recognized by the highest judicial authorities that the Federal Compensation Act, read in conjunction with parallel tort legislation waiving sovereign immunity, meant that there was a right of election on behalf of civilians, the Government sought to amend the Federal Employees' Compensation Act in the fall of 1949, so as to eliminate the right of election, relegating civilians employed by the Government, to an exclusive remedy by way of compensation. We shall see what happened in connection with the government's proposed amendment.

V

The Decision of the Court Below Was an Attempt to Legislate in a Manner Rejected by Congress

By an Act of October 14, 1949, Congress amended section 757 of the Federal Employees' Compensation Act, so that the section presently reads as follows:

> "§ 757. Persons receiving compensation not to be paid for other services; pensions; election; right to compensation as exclusive; exception
>
> (a) As long as the employee is in receipt of compensation under sections 751-791, 793 of this title, or, if he has been paid a lump sum in commutation of installment payments, until the expiration of the period during which such installment payments would have continued, he shall not receive from the United States any salary, pay, or remuneration whatsoever except in return for services in the Army or Navy of the United States: Provided, that whenever any person is entitled to receive any benefits under sections 751-791 and 793 of this title by reason of his injury, or by

reason of the death of an employee, as defined in section 790 of this title, and is also entitled to receive from the United States any payments or benefits (other than the proceeds of any insurance policy), by reason of such injury or death under any other Act of Congress, because of service by him (or in the case of death, by the deceased) as an employee, as so defined, such person shall *elect which benefits he shall receive.* Such election shall be made within one year after the injury or death, or such further time as the Administrator may for good cause allow, and when made shall be irrevocable unless otherwise provided by law.

(b) The liability of the United States or any of its instrumentalities under sections 754-756, 757-791, and 793 of this title or any extension thereof with respect to the injury or death of an employee shall be exclusive, and in place, of all other liability of the United States or such instrumentality to the employee, his legal representative, spouse, dependents, next of kin, and anyone otherwise entitled to recover damages from the United States or such instrumentality, on account of such injury or death, in any direct judicial proceedings in a civil action or in admiralty, or by proceedings, whether administrative or judicial, under any other workmen's compensation law or under any Federal tort liability statute: *Provided, however, that this subsection shall not apply to a master or a member of the crew of any vessel.* As amended July 1, 1944, c. 373, Title VII, §705 (a), 58 Stat. 312; 1946 Reorg. Plan No. 2, § 3, eff. July 16, 1946, 11 F. R. 7873, 60 Stat. 1095; Aug. 13, 1946, c. 958, § 5, 60 Stat. 1049; Oct. 14, 1949, c. 691, Title II, § 201, 63 Stat. 861." (Italics supplied.)

In addition, at 5 U. S. C. A. 791-4 Congress, in the same amendment of October 14, 1949, further provided as follows:

"§ 791-4 Applicability to seamen.

(a) Nothing contained in this Act shall be construed to affect the exclusion of certain seamen (as defined in section 1291 of Appendix to Title 50) from the

terms of the Federal Employees' Compensation Act, as provided by section 1291 of Appendix to Title 50.

(b) *Nothing contained in this Act shall be construed to affect any maritime rights and remedies of a master or member of the crew of any vessel.* Oct. 14, 1949, c. 691, Title III, § 305, 63 Stat. 868." (Italics supplied.)

(While it is probably of little importance, we note that in this case, the petitioner sustained his injury before the enactment of the October 14, 1949 amendment. However, the Government acted upon his compensation application, and made its payment of compensation benefits to him, all subsequent to the amendment. The benefits covered a period which was partly before the effective date of the amendment, as well as a period which was subsequent to the effective date of the amendment.)

It is significant that the amendment of October, 1949, preserved this right of election in favor of only seamen, but eliminated the right of election of other civilians, showing that Congress recognized that there are special considerations applicable to those following the calling of the sea.

This did not come about by accident. Senator Morse from Oregon introduced a specific amendment (adopted by Congress), which excepted seamen from its provisions, preserving their prior right to elect (See "Recent Trends in the Controversy Over the Extension of Workmen's Compensations", 4 N. A. C. C. A. Law Journal 229, pp. 233-4 (1949)). This amendment was accepted by Senator Douglas, when it was made clear to him that there had been no hearings on this aspect of the pending bill, and that it might otherwise be interpreted as denying the right of election of Government-employed civilian seamen, as recognized by the Courts. See statement of Senator Douglas at 95th Congressional Record 13609, 13875-8, as follows:

"It is my further understanding that this bill as amended will only change the status quo of seamen to the extent that it increases compensation rights of those

government-employed seamen covered by the act. For the same reason, namely, that we have had no hearings on the matter, we are not seeking to legislate affirmatively as to certain claims and denials of a right of election of remedies under existing laws, which claims and denials have not yet been adjudicated by the Supreme Court, although various other Federal Courts have, in effect, held that federally employed seamen have such an election."

It is therefore quite clear that the Department of Justice and the Bureau of Employees' Compensation attempted to so amend 5 U. S. C. 757, as to relegate civilian seamen, employed on public vessels, to an exclusive remedy by way of Workmen's Compensation, eliminating their right to sue for damages under the Public Vessels Act. This, however, did not meet with Congressional approval. In short, the Government was unsuccessful in its attempt to have Congress over-rule the decisions of the Courts in the Fourth and Ninth Circuits, as set forth in *U. S.* v. *Marine,* 155 F. (2) 456 (C. A. 4th, 1946), and *U. S.* v. *Loyola,* 161 F. (2d) 126 (C. A. 9th, 1947), which was subsequently followed by the recent decision in *Johnson* v. *U. S.,* 186 F. (2d) 120 (C. A. 4th, 1951), which squarely held that both before and after the 1949 amendment, a civilian seaman, injured on a public vessel, could seek either Workmen's Compensation, or sue in tort, stating as follows:

"(1) In 1949 Congress passed an amendment to the Federal Employees' Compensation Act for the obvious purpose of confining the liability of the United States for injury or death of an employee to the compensation provided by the statute. See Sections 201 (b), 303 (g) and 305 (b) of the Act, approved October 14, 1949, Ch. 691, U. S. Cong. Serv., 81 Cong., 1st Sess., 866 et seq., 5 U. S. C. A. §§ 757, 791-4. This enactment put an end to the option found to exist in the decision of this Court in *U. S.* v. *Marine,* supra. But Section 201 (b) was expressly limited during the progress of the bill through the Senate by a provision that it should not apply to a master or a member of the crew of any vessel; and in the debate on the floor the

purpose of the limitation was stated to be to preserve the rights of seamen and to leave them in exactly the position in which they then were. 95 Cong. Rec. 13874-5. The Clarification Act had already provided that seamen employed by the War Shipping Administration should not be considered as employees of the United States for the purpose of the Compensation Act; but the Amendment of 1949 was not limited to such seamen but applied to the members of the crew of any vessel. See *Militano* v. *U. S.*, 2 Cir., 156 F. (2d) 599. This enactment is relevant to the present discussion, if at all, in that it indicates the same purpose disclosed in the earlier statutes to enlarge rather than restrict the rights of seamen to recover for personal injuries from the United States. The legislative history of the Public Vessels Act, which is set out in *Canadian Aviators, Ltd.* v. *U. S.*, 324 U. S. 215, 218, 65 S. Ct. 639, 89 L. Ed. 901, and in *American Stevedores* v. *Porello*, 330 U. S. 446, 450, 67 S. Ct. 847, 91 L. Ed. 1011, discloses the same general purpose. In our opinion the government's position is not supported by the circumstances under which the foregoing statutes were enacted."

In the light of the foregoing historical background, it would certainly seem that the Court of Appeals for the Second Circuit, has now, by its decision herein, adopted the very judicial amendment which Congress expressly deleted in 1949.

The majority opinion, in coming to its conclusion in the instant case, refused to follow the unbroken line of cases which, until then, had always sustained the validity of a seaman's suit of this type. Not even a single sentence of its opinion was devoted to the historical background of civilian seamen's rights, in general, or to this legislation in particular. The Circuit Court majority did not cite even a single civilian seaman's case in support of its position. What it did, was to point out that if the petitioner had been a member of the armed forces (which he was not), injured in line of duty aboard the vessel, his sole right would have been to recover "compensation" (presumably pursuant to

38 U. S. C. 701 et seq., originally enacted in 1918, which applies only to *military personnel*). From this it concluded that, there being no contrary "clear warrant in the statutory language" of the Federal Employees' Compensation Act (5 U. S. C. 757, originally enacted in 1916, and applying only to *civilian personnel*), Congress must therefore have intended that injured civilian employees of the Government should likewise be confined solely to their own form of workmen's compensation.

We respectfully submit that this reasoning appears to be a complete non sequitur. The Court gave no explanation as to why, for the first time, it was refusing to follow an interpretation of the law which had been recognized for some 30 years, and which Congress had expressly refused to disturb by its 1949 amendment. It did not explain how a Court, sitting in the year 1951, could search out what Congress had intended in 1916, by comparing it with a subsequent act of 1918, applicable to a completely different class of persons.

In *Hust* v. *Moore McCormack Lines*, 328 U. S. 707, 715 reference was made by this Court, of the struggle by civilian seamen to avoid compensation statutes, and of their success in persuading Congress to enact tort damage legislation on their behalf through the years. In commenting on this struggle in *Wagner* v. *Panama R. Co.*, 299 N. Y. 438, 87 N. E. (2d) 448 (1949) the Court stated at page 441:

> "We may not lightly assume an intention by Congress to depart so abruptly from a policy which through a long period of years has become deeply imbedded in maritime law and has been consistently administered by the Courts of this land."

In *Halycon Lines & Vinke & Co.* v. *Haenn Ship Ceiling & Refitting Corp. et al.*, U. S. , Sup. Ct. , 20 L. W. 4094 (decided 1/14/52), this Court recently reiterated the proposition that established law should be changed by Congress, rather than by the courts. In that case, this Court was asked to rule, in a

personal injury maritime tort case, that contribution among joint tort feasors should be permitted. In refusing to change the long recognized common law rule covering this subject, this Court stated:

> "We have concluded that it would be unwise to attempt to fashion new judicial rules of contribution and that the solution of this problem should await congressional action. Congress has already enacted much legislation in the area of maritime personal injuries. For example, under the Harbor Workers' Act Congress has made fault unimportant in determining the employer's responsibility to his employee; Congress has made further inroads on traditional court law by abolition of the defenses of contributory negligence and assumption of risk and by the creation of a statutory schedule of compensation. This Harbor Workers' Act in turn must be integrated with other acts such as the Jones Act (41 Stat. 1007, 46 U. S. C. § 688), the Public Vessels Act (43 Stat. 1112, 46 U. S. C. §§ 781-790), the Limited Liability Act (R. S. § 4281, as amended, 46 U. S. C. § 181 et seq.) and the Harter Act (27 Stat. 445, 46 U. S. C. §§ 190-195). Many groups of persons with varying interests are vitally concerned with the proper functioning and administration of all these Acts as an integrated whole. We think that legislative consideration and action can best bring about a fair accommodation of the diverse but related interests of these groups. The legislative process is peculiarly adapted to determine which of the many possible solutions to this problem would be most beneficial in the long run. A legislative inquiry might show that neither carriers, shippers, employees, or casualty insurance companies desire such a change to be made.
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> In view of the foregoing, and because Congress while acting in the field has stopped short of approving the rule of contribution here urged, we think it would be inappropriate for us to do so."

VI

The Mere Acceptance of Compensation by a Seaman, Is Not the Equivalent of an Election

As to Government-employed civilian shoreside personnel, it has been held that mere receipt and acceptance of compensation benefits is an election, which would be a bar against suing the Government thereafter for damages.

Dahn v. *Davis*, 258 U. S. 421, 41 Sup. Ct. 320 (1922);
Brady v. *Roosevelt S. S. Co.*, 317 U. S. 575, 587, 63 Sup. Ct. 425 (1943);
Militano v. *United States*, 156 F. (2d) 599 (C. A. 2d 1946);
American Stevedores, Inc. v. *Porello, et al.*, 330 U. S. 446, 67 Sup. Ct. 847 (1947).

None of those cases involved seamen. However, in cases involving seamen injured while employed on a public vessel, the Courts have held that the mere application for compensation benefits, coupled with acceptance of payment of such benefits, did not constitute, in and of itself, an "election".

Johnson v. *United States*, 186 F. (2d) 120 (C. A. 4th, 1950);
Mandel & Schmidt v. *United States*, 74 F. Supp. 754 (E. D. Pa., 1947) rev. on appeal on other grounds, 191 F. 2d 164;
Johansen v. *United States*, 191 F. (2d) 162, 163 (C. A. 2nd, 1951). (Instant case, dissenting opinion. Majority did not pass on this point.);
Gibbs v. *United States*, 94 F. Supp. 586 (D. C. Calif., 1951);
McKenney v. *United States*, 99 F. Supp. 121 (D. C. Calif., 1951);
Rodriguez v. *United States*, F. Supp. , 1951

That seamen's cases should be placed in a separate category, is entirely consistent with the liberal tradition in which the courts have interpreted their rights. Historically, the courts, as well as the Legislature, have adopted special provisions for their benefit and protection, and it has been held that even where a seaman files a suit against his Government, or against a Governmental agency, the Court will not permit a general statute intended for shore workers, to be applied so as to delimit the rights of seamen, where there exist specific laws and rulings applicable to mariners showing an intent to safeguard and enlarge their rights.

Shilman v. *United States, et al.*, 164 F. (2d) 649, 652 (C. C. A. 2d, 1947), cert. den. 333 U. S. 837, 68 Sup. Ct. 608 (1948).

Wagner v. *Panama Railroad Co.*, 299 N. Y. 432 (1949).

In *McCarthy* v. *Amer. Eastern Corp.*, 175 F. (2d) 724 (C. A. 3rd, 1949), the Court held that the word "election", as applied to seamen, is not to be given such a harsh construction, as would put them in a position wherein, at their peril, they would be compelled to give up a substantial right, when the word could be given an interpretation more in keeping with the solicitude which the courts have shown for seamen as wards of the Court throughout the years. That case was cited with approval in *Balado* v. *Lykes Bros. SS. Co., Inc.*, 179 F. (2d) 943 (C. A. 2d, 1950).

For the same reasons relied on by the Court in the *McCarthy* case, a seaman cannot release his right to sue for damages for personal injuries, unless it is shown that he signed the release with (a) a full understanding of his legal rights; (b) with knowledge of his physical condition; and (c) for a fair and adequate consideration; and the burden is upon the seaman's employer to prove these things affirmatively, by positive evidence, in order for the seaman to be deprived of rights given him by Maritime Law.

Garrett v. *Moore McCormack Lines Inc.*, 317 U. S. 239, 63 Sup. Ct. 246 (1942);
Bay State Dredging & Contracting Co. v. *Porter*, 153 F. (2d) 827 (C. A. 1st, 1946);
Hume v. *Moore McCormack Lines, Inc.*, 121 F. (2d) 336 (C. C. A. 2d, 1941).

That same rule has been applied even where the Government is the employer of the seaman.

Muruaga v. *United States*, 172 F. (2d) 318 (C. A. 2d, 1949).

We respectfully submit that, with the foregoing as established law, the mere payment of workmen's compensation to a seaman, and his acceptance of such benefits, would not constitute an "election", where his legal rights were not made known to him, and where the other requirements set forth in the above cases, have not been complied with. Petitioner's case here is even stronger, since he was actually misled as to his rights.

Even in a longshoreman's case, an injured workman cannot "elect" unless he knows that he has an alternative remedy. In *Johnsen* v. *American Hawaiian S.S. Co.*, 98 F. (2d) 847 (C. C. A. 9th, 1938), the Court stated:

> "The question thus before this court is whether ignorance on the part of the plaintiff of his right under the act to elect will prevent a valid binding election. In other words, may an employee who has 'elected' to accept compensation under the act without knowledge of the provisions thereof, 'rescind' such election upon discovering his rights thereunder.
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> It seems well settled by the weight of authority in cases other than those dealing with workmen's compensation acts, that an election is not valid and binding where the action has been taken by one without knowledge of his rights and where rights of innocent third parties have not been affected adversely."

It is now well established that the liberal provisions of the Jones Act (46 U. S. C. A. 688) and the General Mari-

time Law, are read in conjunction with the Public Vessels Act and the Suits in Admiralty Act. These apply to the remedies which seamen and longshoremen have, permitting them to sue for damages sustained on a public vessel of the United States, for maintenance and cure, and even for wages.

American Stevedores, Inc. v. *Porello,* 330 U. S. 446, 67 Sup. Ct. 847 (1947);
Canadian Aviator Ltd. v. *United States,* 324 U. S. 215, 65 Sup. Ct. 639 (1945);
Mejia v. *United States,* 152 F. (2d) 686 (C. C. A. 5th, 1945) cert. den. 328 U. S. 862, 66 Sup. Ct. 1366;
United States v. *Loyola,* 161 F. (2d) 126 (C. C. A. 9th, 1947);
Johnson v. *United States,* 186 F. (2d) 120 (C. A. 4th, 1950);
Lauro v. *United States,* 162 F. (2d) 32 (C. C. A. 2d, 1947);
Thomason v. *United States,* 184 F. (2d) 105 (C. A. 9th, 1950);
Jentry v. *United States,* 73 F. Supp. 899 (D. C. Cal., 1947);
Lawson v. *United States,* 1950 A. M. C. 617 (D. C. Cal.).

Longshoremen, from time to time, have been held to be seamen within the meaning of the maritime laws, in order that they might be given the greater historical protection which is accorded to seamen in personal injury cases. *Seas Shipping Co.* v. *Sieracki,* 328 U. S. 85, 66 Sup. Ct. 872 (1946). However, where a longshoreman has received workmen's compensation under the Longshoremen's Compensation Act, he is not barred thereafter from suing the United States of America for damages, pursuant to the Public Vessels Act.

American Stevedores, Inc. v. *Porello,* 330 U. S. 446, 67 Sup. Ct. 847 (1947).

If then, a longshoreman, who has received compensation under the Longshoremen's Compensation Act, following an injury received on a public vessel, is not barred from suing the Government thereafter for damages under the Public Vessels Act, then why should an injured seaman be barred, when he supposedly has greater rights? And further, if an injured seaman cannot even give up his right to claim damages by the signing of a release, unless he has been made aware of all of his rights, then how can he waive his right to seek damages where he has not even signed a release, as in this case? See *Muruaga* v. *United States*, 172 F. (2d) 318 (C. A. 2d, 1949).

It therefore would seem to be established and sound law that the mere payment and acceptance by a seaman of workmen's compensation benefits, when he is entitled to sue for damages, would not, in the absence of an express statute to the contrary (which certainly is not the case here), bar him from suing thereafter to recover damages, when he was not made aware of his rights, but, on the contrary, was even misled as to his rights. Of course, the amount received under the Compensation Act in such a case, would properly be deducted from the verdict awarded to the seaman for damages.

Gahagan Construction Corp. v. *Armao*, 165 F. (2d) 301 (C. C. A. 1st, 1948) cert. den. 333 U. S. 876, 68 Sup. Ct. 905 (1948);

Kibadeaux v. *Standard Dredging Co.*, 81 F. (2d) 670 (C. C. A. 5th, 1936).

CONCLUSION

The Circuit Court came to the conclusion that Congress never intended that civilian seamen working on public vessels should be given greater rights to sue for damages than members of the armed forces. But this would seem to be a matter for Congress to decide.

Rather would it seem that civilian seamen, who perform the same duties on a public vessel, as they would on a merchant vessel owned by the Government, ought not to

be deprived of rights which are enjoyed by their brethren working on the latter class of vessels, merchant seamen being unquestionably entitled to sue for damages.

After all, civilian seamen employed on public vessels are not military personnel. They do not enjoy the privileges enacted by Congress for the protection of members of the armed forces, and, while sometimes subject to military law, they remain civilians. (*Osbourne* v. *U. S.*, 164 F. (2d) 767, 769 (C. A. 2nd, 1947).)

It is a further fact that all civilian seamen, whether employed on a public vessel or a merchant vessel, do give up certain basic rights, such as the right to strike, by voluntarily consenting to subject themselves to the rigors and discipline of life at sea. This, and other aspects of their employment, has prompted Congress to adopt special legislation for their benefit. In commenting on this aspect of a mariner's vocation, Mr. Justice Byrnes, stated in *Southern SS. Co.* v. *N. L. R. B.*, 316 U. S. 31, 62 Sup. Ct. 886 (1942) at page 39:

> "On the other hand workers at sea have been the beneficiaries of extraordinary legislative solicitude, undoubtedly prompted by limits upon their ability to help themselves."

This is again seen in the Compensation Act amendment of October, 1949, the importance of which lies in the fact that it shows that Congress also recognized that under existing law, seamen have special rights, and are governed by special rules in view of their status as wards of the Court. It was also a recognition by Congress that, under existing law, compensation is not the exclusive remedy of seamen employed by the Government on a public vessel.

The decisions of the Fourth and Ninth Circuits therefore appear to be in accord with the historical background of this legislation, and to correctly interpret the pertinent principles of law applicable to this case, while the recent decisions of the Second and Third Circuits (*Mandel* v. *U. S.*, which is being argued at the same time as this case), seem to be a complete departure from what had previously been recognized as well established law.

In 1915, the Jones Act was adopted (46 U. S. C. A. 688). In 1925 the Suits in Admiralty Act was adopted (46 U. S. C. A. 741 et seq.). In 1926 the Public Vessels Act was adopted (46 U. S. C. A. 781 et seq.). In 1943 the Clarification Act was adopted (50 App. U. S. C. A. 1291). In 1950 Public Law 877 was enacted. All of these statutes show a clear intent to enlarge and protect the rights of civilian seamen as a class, and to accord to those employed on Government vessels, the same right to sue for damages as is enjoyed by those on privately operated vessels. This statutory scheme is further carried out in the Federal Tort Claims Act which gives civilians a right to sue for damages for negligence of Government employees, but expressly excludes those cases wherein Congress had already provided a remedy through the Suits in Admiralty Act and the Public Vessels Act (28 U. C. C. A. 2680(d)).

Had Congress intended to write an exception into the Public Vessels Act of the type contended for by the respondent, we may assume it would have done so. The failure to include such an exception in that statute, indicates that civilian seamen, whether employed on private or public vessels of the United States, have a right of action, under the terms of this sweeping legislation, to seek damages for personal injuries based on tort.

If there is to be any change in this well established proposition, the change should emanate from Congress, not from the courts.

The decisions of the District Court and the Court of Appeals, should be reversed.

Respectfully submitted,

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